IN THE SUPREME COURT OF MISSOURI

No. SC87302

STOPAQUILA.ORG, et al.,

Appellants,

v.

CITY OF PECULIAR, MISSOURI

Respondent.

On Appeal from the Circuit Court of Cass County
At Harrisonville, Missouri, Honorable Joseph P. Dandurand

SUBSTITUTE BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This Court granted the City of Peculiar's Application for Transfer, and it has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution, which provides that this Court "may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal."

STATEMENT OF FACTS

In 2004, the City of Peculiar (the "City") and Aquila, Inc. ("Aquila" or the "Company") negotiated an Economic Development Agreement (the "Development Agreement") that defined the rights and obligations of each with respect to the financing, construction, ownership, and leasing of a project (the "Aquila Project") that would enhance electric service to City residents and other residents of western Missouri. (Legal File ("L.F.") 25-26 (¶¶ 10, 14).) The City planned to issue revenue bonds to finance the costs of the Aquila Project pursuant to those methods authorized by the General Assembly and Missouri's voters in Chapter 100 of the Revised Statutes of Missouri and Article VI, Section 27(b) of the Missouri Constitution.[1] (L.F. 26-27 (¶¶ 16, 18).) The transaction was structured so that the City would face no liability or risk for repayment of the revenue bonds or for construction and operation of the Aquila Project. *See infra* at 9-10.

Aquila, a utility company in the business of generating and selling electricity, owned two tracts of land near the City: one is about 2 miles south of the City, and the other is northwest of the City. (L.F. 24-25 (¶¶ 5-7).) The Aquila Project consisted of (1) the construction of electricity generating facilities—a power plant—on

[1] The parties drafted the Joint Stipulation of Facts included in the Legal File before the City issued the revenue bonds and before the Company constructed the Aquila Project. Because the facts that were anticipated at that time have all come to pass, most of the City's statement of facts in this brief is written in the past tense.

the property to the south, (2) the construction of a substation transmission facility on the property to the northwest, and (3) the improvement of transmission lines connected to these facilities. (L.F. 25 (¶ 8).) The Development Agreement required the Company to ensure that the contractors who built the Aquila Project obtained workers' compensation, comprehensive public liability, and builder's risk insurance coverage, naming the City as an additional insured. (L.F. 26 (¶ 15).)

After the City's Board of Aldermen authorized the issuance of the revenue bonds in December 2004, Aquila purchased the 30-year bonds by transferring the Aquila Project (except the transmission lines) and the property on which it is located to the City. (L.F. 27 (¶ 21); Appendix to Brief of Respondent ("Appx.") at A6, (¶¶ 3, 5).) Aquila paid the City an issuance fee of $700,000 on the date of the issuance of the bonds. (Appx. at A6 (¶ 4).) The City granted a deed of trust to encumber the Aquila Project (except the transmission lines) as security for the revenue bonds and the payments in lieu of taxes ("PILOTs") made by Aquila. (L.F. 27 (¶ 20).)

The City then leased the Aquila Project and the property to the Company under a lease-purchase agreement (the "Lease") that requires the Company to make lease payments equal to the debt service on the revenue bonds. (L.F. 27 (¶ 22).) The principal and interest due on the revenue bonds is secured and repaid solely from Aquila's lease payments. (L.F. 28 (¶ 25).) The lease payments are made to a trustee, and the trustee makes payments of debt service on the bonds to the bondholder. (Appx. at A6 (¶ 6).) The Company must purchase the Aquila Project for a nominal amount of $1,000 upon final payment of the revenue bonds. (L.F. 28 (¶ 23).)

The Company was responsible for controlling the construction of the Aquila Project, and it continues to be responsible for operating, insuring, and maintaining the Aquila Project; for billing customers who use electricity from the Aquila Project; and for indemnifying the City for costs and expenses related to the Aquila Project. (L.F. 27 (¶ 22).) The City did not expend any of its own funds to acquire or construct the Aquila Project, and it does not record the Aquila Project as a City asset. (L.F. 28 (¶¶ 22, 23).) In other words, the issuance of the revenue bonds and the construction and operation of the Aquila Project generated no obligations on behalf of the City, financial or otherwise. Instead, the transaction was structured to benefit the City and other local taxing jurisdictions in Cass County by receipt of the PILOTs. (*See* L.F. 28-29 (¶ 27).)

The structure of the bond transaction and the Lease results in the Aquila Project (except the transmission lines) being exempt from property taxes for as long as the City owns legal title. (L.F. 28 (¶ 26).) Instead of property taxes, Aquila has paid and will continue to pay PILOTs. (L.F. 29 (¶ 27).) Pursuant to the Development Agreement, Aquila has already made PILOTs totaling approximately $500,000 to four entities: Cass County, the Raymore-Peculiar School District, the Cass County Library District, and the West Peculiar Fire Protection District. (Appx. at A6-A7 (¶¶ 7, 8).) Over the 30-year term of the transaction, Cass County and the other local taxing jurisdictions will receive approximately $7.3 million in PILOTs. (L.F. 29 (¶ 27).) Without the revenue bond transaction, these taxing jurisdictions would receive approximately $1.6 million in tax revenues, assuming the Aquila Project still would have been constructed. (*Id.*) Aquila

also receives a tax benefit from the transaction: its property tax liability is reduced by approximately $17 million over the 30-year term.[2] (L.F. 29 (¶ 27).)

Even though the City complied with the requirements for financing private projects like the Aquila Project, StopAquila.org and Della and Max January, Gary Crabtree, Nancy Manning, Mark Andrews, and Steve Vincent, as individuals and as representatives of StopAquila.org (collectively, the "Objectors"), sued the City on November 8, 2004, seeking a declaratory judgment that the City could not issue the revenue bonds for the Aquila Project without a vote of the City's qualified electors. (L.F. 5-11.) The Objectors also sought to enjoin the City from issuing the bonds without holding a vote of the electorate. (L.F. 11-13.) None of the Objectors alleged they are City electors, however, and only two claimed to be City residents. (L.F. 1-2. *See also* L.F. 24 (¶¶ 1-2).) The City filed a counterclaim on December 9, 2004, seeking a declaratory judgment that Missouri law authorized the governing body of the City to issue the bonds to finance a project that posed no economic risk to the City. (L.F. 19-23.)

Although the dispute between the Objectors and the City centered on the bond transaction, the Objectors' primary concern was trying to stop construction of the

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[2] Without the bond transaction, these additional tax revenues would have been distributed throughout all Missouri counties in which Aquila has transmission lines, *see* §§ 151.080, 153.030, 153.034, RSMo., rather than concentrated in Cass County. But again, this assumes that the Aquila Project would have been constructed in the absence of the bond transaction.

power plant that is part of the Aquila Project. The Objectors claimed they would be damaged by the issuance of the revenue bonds in part because "a power plant would then be built near their homes, which is unhealthy to people, which lowers their property values, and which is undesirable for other reasons."[3] (L.F. 3 (¶ 12).) *See also* Appellants' Brief ("App. Br.") at 29 (alleging that a "power plant definitely is a problem as it produces a considerable amount of pollution and noise and has high voltage lines").

The circuit court entered judgment in the City's favor on December 27, 2004, confirming the City could issue the revenue bonds for the Aquila Project pursuant to Article VI, Section 27(b) of the Missouri Constitution and Sections 100.010-100.200, RSMo., by a majority vote of the City's Board of Aldermen. (L.F. 32-36.) On January 19, 2005, the Objectors filed a notice of appeal. (L.F. 37-39.)

On appeal, the court of appeals *sua sponte* questioned whether the Objectors had standing to raise their claims, and although the City argued they did not

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[3] Not only did the Objectors sue the City over the bond issue, Cass County sued Aquila, seeking a declaratory judgment and injunctive relief and arguing that Aquila did not have authority from either the county or the Missouri Public Service Commission to build the Aquila Project. *See generally StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005). The Missouri Court of Appeals agreed with the plaintiff in that case, and the Company now has until May 31, 2006 to obtain authority for its construction and operation of the Aquila Project. (Appx. at A4.)

have standing, the court of appeals decided to consider the merits of the case. After the court of appeals reversed the judgment of the circuit court and rejected the City's motion for rehearing and application for transfer, the City filed an application for transfer in this Court. The application was granted on February 28, 2006.

ARGUMENT

This appeal presents the Court with three issues:

(1) Standing is a jurisdictional requirement, and a plaintiff must allege facts in its petition demonstrating that it has standing to bring its claims. Where the Objectors' claims were premised on an assertion that a vote of the City's qualified electors was required to issue revenue bonds, does their failure to allege facts showing that any Objector was a qualified City elector require dismissal of the case?

(2) Article VI, Section 27(b) of the Missouri Constitution allows the governing body of a single city to issue revenue bonds without a public vote for private commercial development where the bonds will be repaid solely from the private entity's lease payments or purchase of the project. Did the City properly issue revenue bonds to finance the Aquila Project, a commercial project for the distribution of electricity, pursuant to a vote of the City's Board of Aldermen where the Company's lease payments equal the debt service on the revenue bonds and the City faces no risk or obligation, financial or otherwise?

(3) A leasehold interest is taxable only to the extent that its actual market value exceeds the amount of the lease payments. By failing to address whether the Company's leasehold interest in the Aquila Project has a value that exceeds its lease payments, did the Objectors fail to establish error in the circuit court's finding that the Aquila Project is exempt from taxes?

The answer to each of these questions is "yes."

I. There is no evidence any Objector had standing to bring this lawsuit.[4]

Standing was not an issue in the circuit court, and the City first argued that the Objectors lack standing when the court of appeals *sua sponte* asked the parties to brief the issue. Because there is insufficient evidence in the record to determine whether any Objector was a qualified elector of the City, this Court should dismiss the case.

Standing is specific to the particular plaintiffs who are challenging a defendant's conduct. *See Reed v. City of Union*, 913 S.W.2d 62, 64 (Mo. App. 1995) (plaintiff must have "a specific and legally cognizable interest in the subject matter of the action"). Without standing, the court lacks jurisdiction to grant relief. *State ex rel. Mink v. Wallace*, 84 S.W.3d 127, 129 (Mo. App. 2002).

Here, the Objectors did not allege any facts to support their bare allegation that they "have standing to bring this action." (L.F. 3 (¶ 13).) Missouri is a fact-pleading state: Rule 55.05 requires plaintiffs to set forth "a short and plain statement of the facts" showing they are entitled to relief, and plaintiffs must comply with this rule to establish standing. *See State ex rel. Mid-Mo. Limestone, Inc. v. County of Callaway*, 962 S.W.2d 438, 441-42 (Mo. App. 1998). Even under the more liberal federal notice-pleading regime, plaintiffs must clearly allege facts demonstrating they are proper parties to invoke judicial resolution of a dispute. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-36 (1990) (vacating portion of judgment below because plaintiffs failed to allege facts demonstrating standing to challenge certain provisions of ordinance).

[4] This section of the City's argument addresses an issue not raised by the Objectors.

Standing cannot be inferred, but instead must affirmatively appear in the record. *Id.* at 231. Here, not one Objector alleged that he or she is a voter whose rights would be affected by the City's failure to hold a public vote before issuing the bonds.

The Petition alleged only that Max and Della January are residents of the City, that the other individuals live "within close proximity to the area" where the power plant was built, and that StopAquila.org consists of the individual plaintiffs and others. (L.F. 3 (¶ 12).) There are no facts in the record from which this Court could reasonably infer that any Objector is a City elector. *Cf. Dodson v. City of Wentzville*, 133 S.W.3d 528, 533-34 (Mo. App. 2004) (when determining whether plaintiff has standing to sue, court can "make reasonable inferences fairly deductible from the facts stated"). Merely alleging that the Januarys are residents of Peculiar does not entitle them to relief as voters.[5]

The Objectors' entire argument is premised on the contention that a vote of the electors was a prerequisite to the issuance of the revenue bonds, and they themselves concede that the electors are "the people who live in the City of Peculiar and are eligible to vote." App. Br. at 18. If none of the Objectors are City electors (and it is undisputed that StopAquila.org, Gary Crabtree, Nancy Manning, Mark Andrews, and Steve Vincent are not City electors), no court has or had jurisdiction over this dispute.

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[5] Missouri law establishes voter qualifications, and residency is only one of the prerequisites. *See, e.g.*, Mo. Const. art. VIII, § 2.

Because the record does not support a finding that any Objector had standing to sue the City as a qualified elector, the Court should dismiss this case.

II. The circuit court properly held the City could issue revenue bonds to fund private development without a public vote.[6]

"The standard of review in a declaratory judgment case is the same as in any other court-tried case. The judgment will be affirmed unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the judgment erroneously declares or applies the law." *R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. banc 2005) (citations omitted). "When the record is stipulated but not all ultimate facts or factual inferences have been conceded, this Court reviews the stipulated facts in the light most favorable to the respondent and disregards inferences favorable to the appellant." *Graue v. Mo. Prop. Ins. Placement Facility*, 847 S.W.2d 779, 782 (Mo. banc 1993). The Court's primary concern is whether the trial court reached a correct result, regardless of the reasoning used. *See id.*

The circuit court's judgment is correct. First, the City issued the revenue bonds pursuant to § 100.100, RSMo., following all applicable procedures in Chapter 100. Second, the City complied with Article VI, Section 27(b), the only constitutional provision addressing the issuance of revenue bonds to finance private development, by holding a vote of the City's Board of Aldermen before issuing the revenue bonds. Finally, the Objectors' myopic focus on the words "power plants" in Article VI, Sections

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[6] This section of the City's brief addresses Point I of the Objectors' argument.

27 and 27(a) ignores the language and history of these provisions, as well as ignoring the only harmonizing interpretation of Sections 27, 27(a), and 27(b):

(1) Section 27 applies when two or more cities contract to cooperate, or form a joint board or commission, to issue revenue bonds for a project.

(2) Section 27(a) applies when a city acts alone to issue revenue bonds for a project it owns and operates.

(3) Section 27(b) applies when a city acts alone to issue revenue bonds for a private manufacturing, commercial, warehousing, or industrial development project.

Under this correct interpretation, the City had every right to issue revenue bonds to finance the Aquila Project, which presents the City with no obligation, liability, or risk.

A. The City issued the revenue bonds for the Aquila Project under the authority granted to it by Chapter 100, which permits financing of the construction and improvement of distribution facilities.

Chapter 100 allows a municipality to issue revenue bonds to carry out a "project" with payment of the bonds to be made solely from the revenues of the project. *See* § 100.100, RSMo. In this context, a project means "the purchase, construction, extension and improvement of warehouses, distribution facilities, research and development facilities, office industries, agricultural processing industries, service facilities which provide interstate commerce, and industrial plants.…" § 100.010(6),

RSMo.[7] Here, the Aquila Project financed by the revenue bonds consisted of the construction of the power plant and the substation and the improvement of the transmission lines. (L.F. 25 (¶ 8).) The Aquila Project provides electricity to the Company's customers and enhances electric service. (L.F. 25 (¶ 10).) Taken as a whole, the Aquila Project is comprised of distribution facilities for electricity.

Statutes related to the jurisdiction and authority of the Missouri Public Service Commission ("PSC") demonstrate that electricity is a commodity requiring distribution facilities. The PSC, which regulates Aquila, has jurisdiction over the "distribution" of electricity. § 386.250(1), RSMo. The PSC can promulgate safety rules and regulations regarding "retail distribution electric line[s]." § 386.310.1, RSMo. The PSC has jurisdiction to regulate an "electric plant," which is defined as all real estate, fixtures, and personal property used for the generation and "distribution" of electricity. § 386.020(14), RSMo. Thus, that the Aquila Project power plant is used for generating electricity does not mean that it is not used for distributing electricity. The Aquila Project, including the power plant, the substation, and the improved transmission lines,

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[7] Because Section 100.010 defines "project" for purposes of Chapter 100, the Objectors' reliance on Section 349.010's definition of "project" makes no sense. App. Br. at 42-43. In fact, that the General Assembly specifically excluded "facilities designed for the sale or distribution to the public of electricity" from Section 349.010's definition of "project" indicates that it could have included the same limitation in Section 100.010. But it did not.

falls within the definition of project in Section 100.010(6) as "distribution facilities" for electricity.

The City complied with all procedural requirements of Chapter 100 in issuing the revenue bonds for the Aquila Project. Aquila submitted a plan to the City in accordance with Section 100.050, the City notified the affected taxing districts and held a public meeting in accordance with Section 100.059, the City approved Aquila's plan by ordinance, and the City's Board of Aldermen authorized the issuance of the bonds. (L.F. 25-26 (¶¶ 11-13); Appx. at A6, (¶ 3).) And in compliance with Section 100.100, the revenue bonds are not a general obligation of the City—they are paid solely from revenue received from the Lease of the Aquila Project. (L.F. 28 (¶ 25).)

The Aquila Project is a commercial operation for the generation and distribution of electricity, and the City's actions complied in every respect with the requirements of Chapter 100. The Objectors apparently concede the City complied with Chapter 100's requirements—they argue only that because Section 100.010(6) does not use the words "utility" or "power plant," Chapter 100 does not apply. App. Br. at 43. Because the revenue bonds financed the construction and improvement of distribution facilities for electricity, the Objectors are wrong.

B. The City complied with Article VI, Section 27(b) of the Missouri Constitution, which requires a vote of a municipality's governing body before the issuance of revenue bonds to finance private commercial development.

Section 27(b) is the only constitutional provision that applies to the Aquila Project, and it requires a vote of a municipality's governing body before the municipality may issue revenue bonds to finance manufacturing, commercial, warehousing, or industrial development facilities that will be leased to a private entity:

> Any county, city or incorporated town or village in this state, by a majority vote of the governing body thereof, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any facility to be leased or otherwise disposed of pursuant to law to private persons or corporations for manufacturing, commercial, warehousing and industrial development purposes, including the real estate, buildings, fixtures and machinery. The cost of operation and maintenance and the principal and interest of the bonds shall be payable solely from the revenues derived by the county, city, or incorporated town or village from the lease or other disposal of the facility.

Mo. Const. art. VI, § 27(b). The Aquila Project has a commercial purpose—generating and distributing electricity for sale—and it thus falls squarely within the scope of Section 27(b).

The Objectors dispute this, asserting that a commercial development is solely a place where goods are bought and sold. App. Br. at 44. But in *King v. Laclede*

Gas Co., 648 S.W.2d 113 (Mo. banc 1983), this Court rejected the argument that "commercial" means only the buying or selling of goods and held a utility's facilities for storing its goods for sale to its customers were undoubtedly commercial. In that case, the utility company stored natural gas in underground tanks during the summer months for use during peak winter demand periods. *Id.* at 114. The company also stored underground propane, which could be vaporized and used when peak demands outstripped the available pipeline supplies. *Id.* The issue facing this Court in *King* was whether the storage operations were commercial—if they were, the utility company was subject to sales taxes imposed on the purchase of electricity used for the operations.

According to this Court in *King*, commercial is defined as "that which has financial profit as a primary aim." *Id.* at 115. The Court then stated:

> Commerce, in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, *and their various operations*, become the objects of commercial regulation.

Id. (emphasis in original) (citation omitted). The storage of natural gas and liquid propane were essential for continuous service to the utility company's customers, which led to this Court's conclusion that the utility company's operations were commercial activities:

> The facts of this case clearly indicate that the use of the electricity was such an integral part of the *commercial activities* of the taxpayer that to construe the use as unrelated to commerce would result in a rejection of the plain meaning of the statute. Almost half of Laclede's customer requirements during severe winter weather could be met only by the operation of these facilities. The facilities were essential to the utility's successful *commercial operation*.

Id. (emphasis added). The Court held that "a common sense understanding" of these operations demonstrated they were commercial. *Id.*

Aquila's generation and distribution of electricity, like the natural gas and liquid propane storage and distribution operations in *King*, are commercial operations. The Aquila Project provides and enhances electric service to Aquila's customers, in the City and elsewhere, and the customers pay for this service. (L.F. 25 (¶¶ 8, 10, 13), 27 (¶ 22).) The Aquila Project and all operations of Aquila incident to the Aquila Project have a commercial purpose as that term is used in Section 27(b).[8] While the Aquila Project

[8] While Section 27(b) uses the term commercial in conjunction with manufacturing, warehousing, and industrial, the inclusion of related terms does not narrow the meaning of commercial. In *King*, this Court expressly rejected a narrow interpretation of commercial, even though it was used in conjunction with the term industrial. 648 S.W.2d at 115.

contains elements that are also utility facilities, that does not negate its commercial purpose.

If the Court were to adopt the Objectors' narrow interpretation of commercial, any number of commercial projects that have been financed pursuant to Section 100.010 and Section 27(b) could be invalidated. Cities and counties throughout Missouri have issued revenue bonds for myriad commercial projects that do not involve the purchase, sale, or exchange of goods, such as office development projects, ethanol processing facilities, agricultural research facilities, electricity distribution facilities, and facilities that house computers to provide internet service. The Objectors' position would severely limit the scope of private commercial projects that can be financed by revenue bonds without a public vote.

The City properly issued revenue bonds to finance the Aquila Project in accordance with Chapter 100 and Section 27(b), and this Court should affirm the circuit court's judgment.

C. None of the Objectors' attempts to impose a public vote requirement on the City is persuasive.

According to the Objectors, "the most important point involved in our constitutional analysis is the fact that the facility is a power plant." App. Br. at 38. Working from this premise, the Objectors take the position that either Article VI, Section 27 or Article VI, Section 27(a) required a public vote of the City's electors to issue revenue bonds for the construction of the Aquila Project. While both sections use the words "power plants," the Objectors ignore the rest of the language of these sections, as

well as their history and context, in a misguided attempt to prove their point. The Objectors also argue the City should have submitted the Aquila Project issue to a vote of the people under Section 88.770 even though they themselves concede that the statute does not address revenue bonds. App. Br. at 39. A closer look at these arguments reveals that none has merit.

1. Section 27(a) does not apply: the Aquila Project is neither exclusively owned nor operated by the City.

Section 27(a) applies to revenue bonds used to finance municipally owned and operated utilities and airports, and the Aquila Project is neither. The provision states:

> Any county, city or incorporated town or village in this state, by vote of a majority of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any of the following: (1) revenue producing water, gas or electric light works, heating or power plants; or (2) airports; to be owned exclusively by the county, city or incorporated town or village, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the county, city or incorporated town or village from the operation of the utility or airport.

Mo. Const. art. VI, § 27(a). Section 27(a) does not apply because the Aquila Project is not owned exclusively by the City, nor are the revenue bonds "payable solely from the revenues derived by the [City] from the operation of the utility." *Id.*

The City holds bare legal title to the power plant, the transmission substation, and the property on which they were constructed, and leases them to Aquila, which exercises all incidents of ownership. (L.F. 27-28 (¶ 22).) The City merely acts as the sponsor to finance the assets for Aquila. (*Id.*) The City does not include any part of the Aquila Project as an asset for financial reporting purposes; instead, the Company must include the Aquila Project's revenues, expenses, and depreciation in its financial reporting and for federal and state income tax purposes. (L.F. 28 (¶ 22).) The City does not hold title or exercise any incidents of control or ownership over the improved transmission lines. (L.F. 27 (¶ 21).) The principal and interest due on the revenue bonds is secured and repaid solely from Aquila's lease payments. (L.F. 28 (¶ 25).) The legal title held by the City as sponsor to finance the Aquila Project is identical to the legal title held by a trustee in trust for the trust beneficiary. *See, e.g., Mercantile Trust Co., N.A. v. Hardie*, 39 S.W.3d 907, 913 (Mo. App. 2001) (fundamental nature of trust is division of title: trustee holds legal title and beneficiary holds equitable or beneficial title).

This Court upheld a similar financing and ownership arrangement in *Wring v. City of Jefferson*, 413 S.W.2d 292, 299 (Mo. banc 1967), declaring that municipal "sponsoring" of a project financed with revenue bonds does not obligate the city to enter into contracts or construct the project itself, and it thereby avoids the imposition of any general obligation or liability on the city. *See also State ex rel. Ashcroft v. City of*

Sedalia, 629 S.W.2d 578, 585 (Mo. App. 1982). A public vote was not required under Section 27(a) because the Aquila Project is neither owned exclusively nor operated by the City. Under Section 27(a), the bonds must be payable solely from the revenues generated by the municipality's operation of the financed project. Here, the bonds are payable from payments received from Aquila under the Lease of the Aquila Project, just as Section 27(b) contemplates. Aquila will make these lease payments even if it derives no revenue from the Aquila Project.

2. Section 27 does not apply when a single municipality issues revenue bonds to finance private development.

Section 27 was made part of the constitution at the same time as Sections 27(a), (b), and (c), and this Court has already held that these sections can be reconciled. *Ashcroft v. City of Fulton*, 642 S.W.2d 617 (Mo. banc 1982). The only way to achieve that reconciliation is to adopt the City's interpretation of Section 27, an interpretation premised on the teachings of *Ashcroft*: Section 27 is aimed at cooperative arrangements where two or more municipalities contract to issue revenue bonds to finance municipally owned and operated utilities, manufacturing and industrial plants to be leased or sold to private entities, and airports.[9]

a. The Objectors focus on the fact that the Aquila Project involves a power plant, but Section 27 does not apply

[9] The text of Article VI, Section 27 is set out in full in the City's Appendix at A14.

when a power plant is leased to a private person or corporation.

On its face, Section 27 does not apply to the Aquila Project under the theory espoused by the Objectors because it does not allow for the lease or disposal of a power plant. The City leases the Aquila Project to the Company, and the Company will eventually purchase the Aquila Project for nominal consideration. The only provision of Section 27 that allows a lease-purchase arrangement applies to plants for manufacturing and industrial development purposes. The Objectors' entire focus is on the fact that the Aquila Project involves a power plant, however, and they do not address the fact that the clause of Section 27 that addresses power plants does not provide for a lease-purchase arrangement. They simply highlight the words "power plants" and the words "plants to be leased," ignoring that these words are located in different clauses. App. Br. at 24.

The second clause of Section 27 specifically mentions leasing and disposal to private persons or corporations. Mo. Const. Art. VI, § 27(2). But this clause is limited to plants for manufacturing and industrial development purposes, and the Objectors have never taken the position that the Aquila Project is for manufacturing and industrial development purposes. As discussed above, the Aquila Project consists of commercial distribution facilities for electricity.[10]

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[10] Although the City has not argued that the Aquila Project is a manufacturing or industrial plant, it could have. *See* Brief of Amicus Curiae Union Electric Company d/b/a AmerenUE at __. In that situation, the Objectors' interpretation of

While the first clause of Section 27 deals with "revenue producing water, sewer, gas or electric light works, heating or power plants," it does not authorize the lease or disposal of those projects. Mo. Const. art. VI, § 27(1). Therefore, when the project is a power plant, Section 27 applies only when the power plant is owned, operated, and used by the cooperating municipalities to provide services to their own residents. The Aquila Project does include a power plant, among other land and improvements. (L.F. 25 (¶ 8).) But it, along with the property and the substation, are leased (and will eventually be sold) to Aquila. (L.F. 27 (¶ 22).) Section 27 therefore does not apply to the Aquila Project. As discussed above, the financing of a leased commercial distribution facility is specifically authorized under Section 27(b).

b. The voters who adopted Section 27 intended to allow municipalities that entered into joint arrangements to issue revenue bonds with a public vote, and Section 27 applies only when two or more municipalities cooperate to issue revenue bonds.

Section 27 does not apply to the Aquila Project because the City acted alone to issue the revenue bonds. Section 27 and Sections 27(a), (b), and (c) were

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Section 27 would read Section 27(b) out of the constitution. *See infra* at Section II(C)(2)(e). The only way to avoid an irreconcilable conflict is to read Section 27 to apply to joint arrangements to issue revenue bonds. *See infra* at Section II(C)(2)(b).

contained in two separate amendments to the Missouri Constitution, both proposed on the same ballot and both passed by the voters. Over two decades ago, this Court held that the amendments did not conflict. *Ashcroft v. City of Fulton*, 642 S.W.2d 617 (Mo. banc 1982). "The fundamental rule of constitutional construction is that courts must give effect to the intent of the people in adopting the amendment and resolve seemingly conflicting provisions by harmonizing those provisions. Substance and not form should govern…." *Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo. banc 1986). The City's interpretation of Section 27—that it applies to joint arrangements—gives effect to the intent of the Missouri voters who voted in favor of the amendment.

Section 27 was designated as "Constitutional Amendment No. 7," and the ballot explained that this amendment permitted "officers established by contract between municipalities or political subdivisions to issue revenue bonds for utility, industrial and airport purposes when authorized by voters." (Appx. at A1.) The ballot language said nothing about individual municipalities. In contrast, the ballot explained that "Constitutional Amendment No. 6" (now Sections 27(a), (b), and (c)) authorized "counties to issue revenue bonds for utility and airport purposes with voter approval" and authorized "governing bodies of counties and municipalities to issue industrial development revenue bonds." (Appx. at A1.) The only way to give effect to the intent of the voters who adopted Section 27 is to conclude that it applies only to joint arrangements.

While Section 27 is not a model of clarity, it applies to municipalities only in the following circumstances: (1) two or more municipalities contract to cooperate, or

form a joint board or commission, to issue revenue bonds for a project; and (2) the project is owned exclusively or jointly by (a) one or more of the cooperating municipalities, (b) the joint commission formed by the municipalities, or (c) municipal or public utilities, or a combination thereof; and (3) if the project involves revenue producing water, sewer, gas or electric light works, heating or power plants, it must be owned and operated by the cooperating municipalities for services provided to their residents as part of their traditional governmental functions.[11] Because these factors are

[11] As discussed above in Section II(A)(2)(a), the cooperating municipalities are required to own the utility project because the only clause of Section 27 that addresses lease-purchase arrangements deals with manufacturing and industrial plants. Section 27 authorizes a variety of ownership arrangements, but in each case the intention is to authorize ownership among cooperating municipalities. Before 1978, Section 27 provided that a project must be "owned exclusively by the municipality," which meant that the utility was a traditional municipal function. *See Monroe City v. Southern*, 259 S.W.2d 706, 710 (Mo. banc 1962). The option of exclusive ownership carried over to the current language in Section 27, and it now provides that the project may be owned "exclusively" or "jointly" or "by participation" involving one or more of the cooperating municipalities and/or the joint commission. Section 27 authorizes exclusive municipal ownership as one of many ownership options, but only when that ownership is pursuant to several cities acting cooperatively by contract.

not presented by the Aquila Project, the revenue bonds did not need to be approved by a vote of the City's qualified electors under Section 27.

In *Ashcroft v. City of Fulton*, this Court held Section 27 "allows officers, established by contract between municipalities or political subdivisions, to issue revenue bonds for utility, industrial and airport development when authorized by voters."[12] 642 S.W.2d at 620. The Joint Municipal Utility Commission Act ("JMUC Act") reinforces this holding as the legislative interpretation of Section 27. *See* §§ 393.700-393.770, 393.295, RSMo. The definitions in the JMUC Act mirror Section 27's language: the definitions of "commission" and "contracting municipality" are identical to the types of entities referenced in Section 27, and the definition of "project" includes all of those types of projects referenced in part (1) of Section 27. § 393.705(2), (3), & (6), RSMo.

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[12] Other discussion in *Ashcroft* reflects that Section 27's purpose is to authorize cooperating municipalities and joint commissions to issue revenue bonds. According to this Court, the relator claimed that "amendments six and seven to article VI, section 27 of the Missouri Constitution providing for formation of the Joint Municipal Utility Commission never became part of the constitution and that respondents should be ousted of all rights, power and authority they claim under section 27 as amended." 642 S.W.2d at 618. The Court later explained the respondents' actions: "The City of Fulton and seventeen other Missouri municipalities formed the Missouri Joint Municipal Electric Utility Commission pursuant to the provisions of article VI, section 27 as amended." *Id.* at 620.

And the JMUC Act specifically authorizes a commission, as defined in the Act, to incur debts, liabilities, and obligations including "the issuance of bonds pursuant to the authority granted in section 27 of article VI of the Missouri Constitution…." § 393.715(12), RSMo.

In light of *Ashcroft v. City of Fulton*, the JMUC Act, and the analyses of Sections 27(a) and (b) above, *see supra* Sections II(B) and II(C)(1), the relevant provisions of Article VI of the Missouri Constitution provide the following general framework with respect to revenue bonds issued by a city or cities:

Section 27 applies when two or more cities contract to cooperate, or form a joint board or commission, to issue revenue bonds for a project. The project may be owned exclusively by one or more of the cooperating cities, the joint commission, or municipal or public utilities. Only plants for manufacturing and industrial development purposes may be leased or sold to private persons or corporations by cooperating cities and boards.

Section 27(a) applies when a city acts alone to issue revenue bonds where the project is owned exclusively by the city, the bonds are payable solely from revenues derived from operation of the project by the city, and the project is part of the basic governmental service provided by the municipality.

Section 27(b) applies when a city acts alone to issue revenue bonds, the project will be leased or sold to private persons or corporations, and the bonds are payable solely from the revenues derived from the lease or disposal of a manufacturing,

commercial, warehousing, or industrial development project for which the municipality has no obligation or risk.

For the Aquila Project, the City did not act cooperatively with other cities by contract, and it did not participate in the formation of a joint municipal utility commission or a joint board. The City's Board of Aldermen approved the Aquila Project, the revenue bonds are paid solely from revenue derived from the Lease of the Aquila Project, and the City is not using the Aquila Project for any of its governmental functions. Section 27 does not apply to the Aquila Project or the revenue bonds, and a public vote was not required.

c. The history of the constitutional provisions that address revenue bond financing supports the City's interpretation of these provisions.

Section 27 does not apply to the Aquila Project because Section 27 has been amended to exclude financing for private development with revenue bonds issued by a single city acting alone. The series of this Court's cases that trace the history of Section 27 and Sections 27(a), (b), and (c) shed light on the legal and constitutional distinction between municipal financing of public projects and municipal financing of private projects. The original purpose of Section 27, as adopted in 1945, was to require a public vote on revenue bonds when cities were financing governmental functions, which included the ability to impose rates and charges on their residents to finance the construction and operation of their utilities:

> Section 27…was applicable to revenue bonds for only municipally owned public utilities and municipally owned airports. The ownership and operation of the former, at least, had long been regarded as a traditional function of municipal government. The later (airports), by virtue of advances in air transportation and the consequent demands of changing times, had more recently succeeded to that status. Such practices, as functions of municipal government, had been so long well established and universally recognized that we do not pause to cite the numerous statutes then (and now) expressly authorizing municipalities so to do.

Monroe City v. Southern, 259 S.W.2d 706, 710 (Mo. banc 1962). When Section 27 was added to the Missouri Constitution in 1945, it was self-executing—that is, no additional legislation was needed to allow cities to issue revenue bonds to finance city-owned and city-operated utilities. *State ex rel. City of Fulton v. Smith*, 194 S.W.2d 302, 304 (Mo. banc 1946). Over time, Section 27 was amended to reflect innovations in municipal financing of private projects, allowing municipalities to issue revenue bonds for commercial purposes and granting the power to lease and sell financed facilities to private entities.

In contrast to the 1945 version of Section 27, its 1960 amendment, which allowed municipalities to issue revenue bonds for "plants to be leased to private persons or corporations for manufacturing and industrial development purposes," was not self-

executing. *Monroe City*, 259 S.W.2d at 710. This Court held that the General Assembly needed to provide additional guidance: "this innovation by the way of municipal financing of industrial projects is so new and untried, its possibilities so sweeping, and its operation and potentialities so utterly uncertain (and great) as to imperatively require statutory charting of its course." *Id.* at 711. The General Assembly enacted Chapter 100's predecessor to provide the legislative vehicle to lease and dispose of facilities that were financed through revenue bonds authorized by the 1960 version of Section 27.

In *Wring*, this Court re-affirmed *City of Fulton v. Smith* and *Monroe City v. Southern* and held that, by merely "sponsoring" private development through revenue bonds, a city did not need to let construction contracts for the project through a competitive bidding process because the city was not at financial risk. *See Wring*, 413 S.W.2d at 299.

The final relevant innovation to Section 27 occurred in 1978. As discussed above, the General Assembly submitted two constitutional amendments to the voters, both of which would repeal and replace Section 27. Amendment No. 7 resulted in the current version of Section 27, which authorizes joint boards and commissions to issue revenue bonds with a public vote for projects jointly undertaken by municipalities, and Amendment No. 6 resulted in the current versions of Sections 27(a), (b), and (c). Both amendments were approved by a majority of the voters. The governor declared that the two amendments were in conflict and that Amendment No. 7, which received the largest number of votes, had become part of the constitution to the exclusion of Amendment No.

6. *Ashcroft v. City of Fulton*, 642 S.W.2d at 619-20. This Court disagreed, holding there is no irreconcilable conflict between the two amendments:

> There is no conflict between the texts of the amendments. Amendment six [in Section 27(a)] authorizes counties to issue utility or airport revenue bonds with voter approval. It further authorizes the governing bodies of counties and municipalities to issue industrial development revenue bonds [in Section 27(b)]. Amendment seven [in Section 27] allows officers, established by contract between municipalities or political subdivisions, to issue revenue bonds for utility, industrial and airport development when authorized by voters. Amendment seven appears to include all the power granted in amendment six and provides for formation of joint commissions. Though the language used in the amendments is somewhat different thereby creating some tension between them, there is no irreconcilable conflict. Both amendments became part of the constitution when adopted by the voters.

Id. at 620. The Objectors make no attempt to explain how their interpretation of Section 27 comports with this history or with this Court's reconciliation of the provisions in *Ashcroft v. City of Fulton*.

d. Requiring a public vote for the issuance of bonds only when a city will have exclusive ownership of a project,

incur an obligation or indebtedness that funds a project, or incur liability for a project reinforces the policy underlying the revenue bond provisions.

Section 27 does not apply because the City has no ownership, liability, or indebtedness for the Aquila Project. The City's interpretation of Sections 27, 27(a), and 27(b) gives unique meaning to each provision and reflects the policy of protecting public funds by requiring a public vote when a city or cities will (1) have exclusive municipal ownership of the project funded by the bonds; (2) incur an obligation or indebtedness for the bonds; or (3) incur liability for the project funded by the bonds, payable from taxes. None of these conditions is present in the projects contemplated by Section 27(b), which is why it authorizes the governing body of the municipality to issue revenue bonds without a public vote.

Section 27 allows cooperating municipalities to repay revenue bonds from the revenues derived from their operation of a utility or project, or from a lease of the project. If a city operates a utility or project, either independently or jointly pursuant to contract, the city will incur liabilities associated with the project and an indebtedness or obligation to repay revenue bonds from rates and charges imposed by the city from its ownership and operation of the project. Section 27(c), which provides that revenue bonds issued pursuant to Sections 27(a) or 27(b) are not an indebtedness or obligation of the issuing city, does not expressly apply to revenue bonds authorized by Section 27. Thus, Section 27 requires a public vote because a city may independently or jointly pledge city funds and assume liabilities by contract with other cities.

As provided in Section 27(c), the bonds issued pursuant to Section 27(a) are not an indebtedness or liability of the issuing city. Section 27(a) is similar to the 1945 version of Section 27: it requires a vote of the qualified electors when a city owns and operates a utility at its financial risk because the revenue bonds that finance the facilities will be retired through revenue collected from city residents by the city, which operates the utility as a traditional function of municipal government. *Cf. City of Fulton*, 194 S.W.2d at 305. In this situation, the city could incur liabilities through ownership and operation of the project, even though the bonds are not a general obligation of the city.

In contrast, Section 27(b) does not require a public vote because the revenue bonds are repaid solely from lease payments by the private development. Revenue bonds for a private manufacturing, commercial, warehousing, or industrial development project impose no financial risk on the city because the lease payments equal the debt service on the revenue bonds, and financial risk is further reduced because the private company must meet other obligations to maintain, insure, and operate the project. The applicable constitutional and statutory provisions meticulously guard against a city incurring any liability or obligation regarding a private development project financed with revenue bonds. *See Wring*, 413 S.W.2d at 299. While the city may hold bare legal title to a project—a concept specifically contemplated in Section 27(b) because a city could not lease a project if it did not have some ownership interest—if all incidents of ownership and all liabilities associated with ownership and operation are assumed by the private entity, the city is not at risk.

The revenue bonds authorized by Section 27(b) are like those discussed in *Wring*. The 1967 version of Section 27, which was at issue in *Wring*, allowed lease and disposal of the project and payment of the revenue bonds solely from revenues derived by the municipality from the lease or disposal of the facility. This language now appears only in Section 27(b), which was added to the constitution to allow use of this financing tool without a public vote. All other provisions in Article VI impose on the issuing city an exclusive ownership obligation, personal indebtedness, or personal liability, and they therefore require a public vote prior to assuming these risks.

The Objectors attempt to rely on Article VI, Sections 23(a) and 26(e) to establish the requirement of a public vote, App. Br. at 28, but these provisions lend support to the City's position. They require a public vote because the municipality will expose itself to risk on a project, unlike the projects contemplated by Section 27(b). Section 23(a) requires a public vote before a city can become indebted to purchase, construct, extend, or improve plants for manufacturing, warehousing, and industrial development purposes. And Section 26(e) requires a public vote to authorize additional indebtedness for the purposes of purchasing or constructing waterworks or electric or other light plants to be owned exclusively by the city, in the amount of an additional 10% of the value of the taxable tangible property within the city. There is a distinction between public indebtedness and the financing of private development, and the City's analysis preserves that distinction.

In contrast to the constitutional provisions that are directed toward an increase in a municipality's obligations or liabilities, Section 27(b) does not require a

public vote. It allows a municipality's governing body to issue revenue bonds when a private entity will lease or own a project that does not serve a traditional municipal purpose, when the project falls within the categories Section 27(b) describes, when the city will not incur indebtedness for the revenue bonds as provided in Section 27(c), and when the city will not incur personal liability for the project. The City's interpretation of Sections 27, 27(a), 27(b), and 27(c) gives effect to the policy underlying the public vote requirement.

e. The Objectors' interpretation of Section 27 creates an irreconcilable conflict with Section 27(b).

Section 27 does not apply to the Aquila Project, because if it did, Section 27(b) would be rendered meaningless. The Objectors ignore history, context, and policy, and they take the position that, because Section 27(1) says "power plants," a public vote is required to issue revenue bonds without regard to who bears the financial risk for the facility. By this logic, Section 27 requires a municipality to hold a public vote to issue revenue bonds for manufacturing and industrial development that will be leased to private entities, in spite of the fact that Section 27(b) specifically allows the governing body of a municipality to approve this financing tool. Thus, the Objectors' interpretation of Section 27 creates the "irreconcilable conflict" that this Court already held does not exist. *See Ashcroft v. City of Fulton*, 642 S.W.2d at 620.

Section 27 and Section 27(b) both contain the words "manufacturing" and "industrial development." Section 27(2) requires a public vote for revenue bonds issued to finance plants leased or sold to private entities for "manufacturing and industrial

development purposes." Section 27(b) authorizes the issuance of revenue bonds with no public vote to finance facilities leased or sold to private entities "for manufacturing, commercial, warehousing and industrial development purposes." The Objectors' interpretation would read Section 27(b) out of the Missouri Constitution to the extent it authorizes the issuance of revenue bonds for manufacturing and industrial development without a public vote, contrary to the well-established rule that every constitutional provision be given meaning and effect. *See Ashcroft v. City of Fulton*, 642 S.W.2d at 620-21.

The City's interpretation of the relevant constitutional provisions gives meaning to all, and it takes into consideration the distinction between revenue bonds issued for public purposes and revenue bonds issued for private purposes. If Section 27 were applied to individual municipalities, Section 27(b) would be rendered meaningless for any private development that also happens to be mentioned in Section 27.

The Objectors may take the position that because this case is limited to a "power plant," this Court need not worry about the implications of the Objectors' interpretation. *See* App. Br. at 28 ("There does not appear to be any ambiguity, as applied to our case.") (emphasis supplied). But there is no way to avoid the fact that if this Court were to adopt the Objectors' interpretation, Section 27 would prohibit what Section 27(b) permits: the issuance of revenue bonds for private manufacturing and industrial development purposes without a public vote. *See Ashcroft v. City of Fulton*, 642 S.W.2d at 620 (describing test for determining whether conflict exists).

And taking into consideration the Objectors' interpretation of commercial as used in Section 27(b), *see supra* at Section II(B), the only revenue bonds that could be issued without a public vote would be those used to finance warehousing projects and commercial projects involving the purchase and sale of tangible goods at the facility. If this analysis were made law, it would stifle revenue bond financing for all other forms of commercial development and all manufacturing and industrial development throughout Missouri.

3. The Objectors failed to preserve their Section 88.770 argument, but even if they had not, Section 88.770 does not apply to the situation before this Court.

The Objectors now claim that Section 88.770 required the City to submit the financing of the Aquila Project to the voters because it involves the "concepts" of erecting electric works, entering into a contract with Aquila, and granting or extending rights to Aquila. App. Br. at 39. But the Objectors did not raise this argument below, and this Court does not consider arguments raised for the first time on appeal. *See Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 25 n.21 (Mo. banc 2003). Even if the Court were to consider the argument, it fails on the merits. The public vote requirements of Section 88.770 arise in three specific situations, none of which is applicable here.

First, the statute requires a public vote when a municipality contracts for street lighting or other public lighting. § 88.770, RSMo. *See also Palmer v. City of Liberal*, 64 S.W.2d 265, 268 (Mo. 1933) (discussing earlier version of Section 88.770).

The Aquila Project does not involve street lights or a contract to provide electricity to the City for the lighting of the City streets. (L.F. 25 (¶¶ 8-10).) The Development Agreement does not address street lights or the provision of electricity for street lights. (L.F. 26 (¶¶ 14-15).)

Second, Section 88.770 requires a public vote when a municipality provides an "initial grant" of up to a twenty-year electric franchise to a power company to provide electricity to that municipality. *See City of Brunswick v. Myers*, 209 S.W.2d 134, 135 (Mo. 1948) (public vote held for twenty-year electric franchise). This requirement addresses the process by which a city, through a public vote and adoption of an ordinance, gives its initial consent to a power company to provide long-term electric service to the city, which is then followed by PSC approval. *See State ex rel. Sikeston v. Pub. Serv. Comm'n*, 82 S.W.2d 105, 108-109 (Mo. 1935). The Aquila Project does not involve the initial grant of an electric franchise by the City to Aquila to provide electricity to the City, and the Development Agreement is not an electric franchise contract. The Aquila Project enhances the electric service to existing customers within the City (L.F. 25 (¶ 10)), but this enhancement is not the same as an initial grant of an electric franchise.

Finally, Section 88.770 requires a public vote when a municipality sells, conveys, encumbers, or leases any public utilities it owns. Aquila owns, operates, insures, and maintains the Aquila Project, not the City. (L.F. 27 (¶ 22).) The City holds bare legal title to the Aquila Project (with the exception of the transmission lines) in order to issue the revenue bonds to finance the Aquila Project and sponsor it. Aquila exercises

and controls all incidents of ownership over the Aquila Project. (L.F. 27-28 (¶ 22).) The City does not include any of the Aquila Project as an asset for financial reporting purposes; instead, Aquila includes the Project as an asset for its financial reporting purposes, including for federal and state income tax purposes. (L.F. 28 (¶ 22).) The City does not hold title or exercise any incidents of control or ownership over the transmission lines. (L.F. 27 (¶ 21).)

This arrangement is the type of "sponsorship" specifically authorized by Chapter 100, *see Wring*, 413 S.W.2d at 299, and it is not governed by Section 88.770.[13] The City did not construct and then lease or sell its own public utility financed with taxes or charges imposed on its residents by the City, which is the subject of Section 88.770. The provisions of Chapter 100 are the statutes that govern the City's actions related to the Aquila Project.

III. The circuit court did not err in finding the Company's interest in the Aquila Project would be free from taxation, but even if it did, the finding has no material impact on the merits of the Objectors' position in this lawsuit.[14]

"The standard of review in a declaratory judgment case is the same as in any other court-tried case. The judgment will be affirmed unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or

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[13] Similarly, Section 71.530 does not address a municipality's ability to issue revenue bonds to finance private development. *See* App. Br. at 41.

[14] This section of the City's brief addresses Point II of the Objectors' argument

the judgment erroneously declares or applies the law." *R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. banc 2005) (citations omitted). "No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action." Rule 84.13(b).

The Objectors challenge the circuit court's Finding of Fact No. 21, which states: "As a result of the revenue bonds and the lease arrangement, the project, except the transmission lines, will be exempt from property taxes, whether real, personal, or otherwise, levied by any applicable taxing authority…for as long as Defendant City holds legal title to the Project." (L.F. 35.) The basic premise for the Objectors' claim of error is that the circuit court failed to include the words "The City takes the position that" prior to its finding, even though those six words preceded the identical language in the Joint Stipulation of Facts. (L.F. 28 (¶ 26).) The Objectors argue that the City and the Company cannot by agreement provide that other taxing authorities cannot impose property taxes on the Company because its leasehold interest in the Aquila Project is not exempt from taxes.[15] App. Br. at 48.

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[15] Ironically, this argument emphasizes the two property interests involved in the Aquila Project: (1) the City's fee simple ownership of everything except the transmission lines, and (2) Aquila's leasehold interest. As discussed in detail above, Section 27(b) allowed the City to issue the revenue bonds to pay for the Aquila Project, which is currently leased to Aquila and will later be sold to Aquila, and the principal and interest on the revenue bonds are paid solely from the

First, the challenged finding does not specifically mention the taxable status of the Company's leasehold interest in the Aquila Project, so it is difficult to see how the circuit court's statement could have any real impact if a taxing authority attempted to tax Aquila on its leasehold interest. More importantly, a finding in a case between the Objectors and the City could not possibly affect a dispute between some other taxing authority and Aquila. The Objectors offer no legal theory of estoppel under which the circuit court's finding would be binding on a taxing authority that was not party to this lawsuit, and there is none. *See, e.g., Oates v. Safeco Ins. Co.*, 583 S.W.2d 713, 719 (Mo. banc 1979) (one element of collateral estoppel is "whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication"); *Besand v. Gibbar*, 982 S.W.2d 808, 810 (Mo. App. 1998) ("Judicial estoppel applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time."). *See also Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. banc 1998) ("The purpose of the doctrine of equitable estoppel is to prevent a party from taking inequitable advantage of a situation he or she has caused."). The Objectors

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revenues derived from the Lease. The Objectors' argument about Aquila's leasehold interest reinforces the point that neither Section 27(1) nor Section 27(a) provide for the lease of a power plant financed by revenue bonds.

themselves point out "that the other taxing authorities were not parties to this litigation and cannot be bound by this judgment." App. Br. at 47.

Second, the Objectors do not explain how this allegedly incorrect finding of fact would have any impact on the merits of their position. The taxable value of Aquila's leasehold interest is not their concern in this lawsuit, and whether the circuit court included or omitted the phrase "The City takes the position that" does not affect the validity of the revenue bonds as approved by the City's Board of Aldermen.

Finally, the Objectors never establish that the taxation finding is incorrect, as they entirely fail to discuss the relevant analysis regarding taxation of leasehold interests or to point to any facts demonstrating that Aquila's interest would be taxable. A leasehold interest in city-owned property is taxable only where the lessee receives some "bonus value" above and beyond the fair market value of the lease. *Frontier Airlines, Inc. v. State Tax Comm'n*, 528 S.W.2d 943, 946-47 (Mo. banc 1975). When the lease payments are equal to or higher than the fair market value of the leased property, there is nothing to tax. *See id.* at 947. Only when the lease payments are less than the actual market value of the use and occupancy of the leased property does a lessee have a taxable leasehold interest equal to this "bonus value." *Id.* The value of a leasehold must be determined by the facts and circumstances specific to that lease, including the testimony of appraisers. *See id.*

The payments Aquila makes pursuant to the Lease amortize the debt service payments on the revenue bonds. (L.F. 27 (¶ 22).) The Objectors point to nothing establishing that Aquila's Lease has a "bonus value," and there is absolutely no evidence

in the record that the lease payments are lower than fair market value for the lease of the Aquila Project. Any challenge regarding the taxable status of Aquila's leasehold interest would be a fact-intensive matter, requiring evidence about the economic value of Aquila's leasehold interest, if any. This issue, and the facts necessary to address it, is far beyond the scope of this lawsuit.

Whether any party asked for the finding regarding the taxable status of the Aquila Project is not important. *See* App. Br. at 48, 50. The point is that the Objectors have failed to establish that the circuit court's finding of fact is contrary to the weight of the evidence, and even assuming there was some error, it would have no material effect on the merits of this action. This Court should affirm the judgment below.

CONCLUSION

The Objectors have failed to establish that they have standing to challenge the City's issuance of the revenue bonds without a vote of the City's qualified electors, and for this reason, this Court lacks jurisdiction over this appeal. But if the Court decides to reach the merits, it should affirm the circuit court's judgment.

First, the circuit court's finding that the Aquila Project is exempt from taxation is correct, and even if it were not, this issue has no impact on the merits of the Objectors' claims.

Second, the City properly issued revenue bonds pursuant to Article VI, Section 27(b) of the Missouri Constitution to finance private commercial development, the issue that lies at the heart of this appeal. The City financed the Aquila Project, which consists of private commercial distribution facilities for electricity, to enhance electric

service to its residents and to obtain additional tax revenues for taxing authorities in Cass County. The City was not and is not responsible for insuring, constructing, operating, or maintaining the Aquila Project, and the City has no obligations under the revenue bonds, which are payable solely from Aquila's lease payments.

This Court has already held that Section 27 can be reconciled with Sections 27(a), (b), and (c). The only way to harmonize those provisions and to give meaning to Section 27(b) is to hold that Section 27 applies only to joint arrangements and that Section 27(b) allows a municipality, acting alone, to sponsor private development, in accord with the intent of the Missouri citizens who voted to amend the constitution. Any other reading would cast doubt on projects that have been financed pursuant to Section 27(b), as well as impacting future financing of private development in Missouri. Here, the City acted alone to issue the revenue bonds for the Aquila Project, and a public vote was not required. The City respectfully requests the Court affirm the judgment of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains 11,866 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3-1/2 inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by regular mail, postage prepaid, this 7th day of April, 2006, to:

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